Supreme Court, U.S.
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No. _____

In the

SUPREME COURT OF THE UNITED STATES

October Term, 1998

JOSEPH A. MOHWISH,
Petitioner

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

A. **Is it *per se* reversible error to convict under the *Pinkerton* doctrine when no instructions are given and when the conviction rests solely on vicarious liability?**

B. **Does *Yates* require reversal of a CCE conviction when jurors are provided with a list including individuals who are ineligible as a matter of law for consideration as supervisees?**

C. **Did the district court commit reversible error in failing to instruct the jury that it must agree unanimously on which particular drug violations constituted the "series of violations" required for conducting a continuing criminal enterprise in violation of 21 U.S.C. § 848?**

D. **Did the Sixth Circuit court of appeals err when it denied Joseph Mohwish's request for a certificate of appeal on the above-stated issues?**

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PETITION FOR WRIT OF CERTIORARI

THE PETITIONER, JOSEPH A. MOHWISH, by and through his attorney, Clifford J. Barnard, hereby respectfully petitions this Court to issue a writ of certiorari to review the judgment and opinion of the Sixth Circuit Court of Appeals entered on September 23, 1998. *See* Appendix D at page 81.

I. OPINIONS BELOW

United States Magistrate Judge Wehrman for the

Eastern District of Kentucky issued a Report and Recommendation in case number CV-97-40 on January 6, 1998 recommending that Mr. Mohwish's 28 U.S.C. § 2255 motion to vacate judgment and sentence be denied. *See* Appendix A at page 29.

The United States District Court for the Eastern District of Kentucky issued an Order on March 18, 1998 denying Mr. Mohwish's 28 U.S.C. § 2255 motion. *See* Appendix B at page 77.

On May 22, 1998, the United States District Court denied Mr. Mohwish's application for a certificate of appealability. *See* Appendix C at page 79.

On September 23, 1998, the Sixth Circuit Court of Appeals in an unpublished opinion in case number 98-5708 denied Mr. Mohwish's application for a certificate of appealability. *See* Appendix D at page 81.

Some of Mr. Mohwish's convictions were overturned and some affirmed on direct appeal in the published case of *United States v. Patrick*, 965 F.2d 1390, (6th Cir.), *cert. denied*, 506 U.S. 940, 113 S.Ct. 376, 121 L.Ed.2d 287 (1992), *vacated in part*, *Mohwish v. United States*, 507 U.S. 956, 113 S.Ct. 1378, 122 L.Ed.2d 754 (1993).

II. JURISDICTION

The date of the judgment which is sought to be reviewed is September 23, 1998.

On December 14, 1998, Justice Stevens extended the time within which to file the petition for a writ of certiorari to and including February 20, 1999. *See* Appendix E at page 82. Because February 20, 1999 is a Saturday, Mr. Mohwish's petition is due on or before Monday, February 22, 1999.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254.1. *See also, Hohn v. United States*, 524 U.S. ___, 118 S.Ct. 1969, 141 L.Ed.2d 242 (1998).

III. CONSTITUTIONAL AND STATUTORY PROVISIONS

The constitutional provisions involved in this petition are the United States Constitution's Fifth Amendment Due Process Clause (*see* Appendix F at page 83) and Sixth Amendment right to counsel (*see* Appendix G at page 83).

The statutory provision involved in this petition are 21 U.S.C. § 848(c) (*see* Appendix H at page 84), 28 U.S.C. § 2253(c) (*see* Appendix I at page 85) and 28 U.S.C. § 2255 (*see* Appendix J at page 86).

IV. STATEMENT OF THE CASE

A. Nature of the Case

Mr. Mohwish brought a collateral attack pursuant to 28

U.S.C. § 2255 in the United States District Court for the Eastern District of Kentucky, asking the court to vacate the judgment and sentence in his case because he had been rendered ineffective assistance of counsel at trial and on appeal. The basis for federal jurisdiction in the district court was 28 U.S.C. § 2255.

1. Statement of Facts

This case required the jury to choose between two radically divergent versions and interpretations of financial transactions and other activities by Joseph Mohwish and three other defendants. The government's witnesses wove a tale in which Messrs. Mohwish and Patrick were the kingpins of a drug operation, laundering money through a very successful local car dealer, co-defendant Delmus "Bunt" Gross. Mr. Mohwish, however, testified that he had no knowledge of any drug dealings and that the money which he received from Gross consisted of business and personal loans from Gross or his business. Mr. Mohwish denied his guilt at trial and continues to this day to deny his guilt.

Joseph A. Mohwish was charged along with three other individuals (his wife, Kathy Mohwish, Bill Patrick and Delmus Gross) in a 39 count indictment issued on December 14, 1988. All four defendants were charged with conspiracy to distribute drugs (Count 2), conspiracy to violate the Currency Transaction

Reporting Act ("CTRA") (Count 13) and money laundering (Count 31). Mohwish and Patrick were charged with organizing a continuing criminal enterprise (Count 1) and attempted possession of marijuana (Count 5). Patrick was charged with four additional drug distribution crimes (Counts 3, 4, 6 and 7) and five counts of interstate travel (Counts 8-12). Mohwish and Gross were charged with 17 counts of aiding and abetting violations of the CTRA (Counts 14-30) and one count of aiding and abetting money laundering (Count 32). Mr. and Mrs. Mohwish were charged with three counts of filing a false income tax report (Counts 33-35) and one count of failing to file income tax reports (Count 36). Patrick was charged with one count of filing a false income tax report (Count 37) and two counts of failing to file income tax reports (Counts 38-39).

The district court dismissed Count 36 before the case was given to the jury.

At trial, the jury acquitted Kathy Mohwish of all charges, acquitted Joseph Mohwish of Counts 5, 31 and 32, acquitted Bill Patrick on Counts 4, 5 and 31, and acquitted Bunt Gross of Counts 2, 31 and 32. The jury found Mr. Mohwish guilty of 23 counts, Patrick guilty of 14 counts and Gross guilty of 17 counts.

On appeal, the Sixth Circuit reversed and vacated Mr. Mohwish's conspiracy conviction (Count 2) and his sixteen

CTRA convictions (Counts 14 and 16-30), reversed Patrick's CCE conviction (Count 1), and reversed fifteen of Gross's convictions (Counts 16-30).

Presently, Mr. Mohwish stands convicted of six charges, organizing a continuing criminal enterprise (Count 1), conspiracy to violate the CTRA (Count 13), aiding and abetting a violation of the CTRA (Count 15) and three counts of filing false income tax reports (Count 33-35). Patrick stands convicted of thirteen charges, conspiracy to distribute controlled substances (Count 2), three substantive drug distribution charges (Counts 3, 6, 7), five interstate travel charges (Counts 8-12), conspiracy to violate the CTRA (Count 13), one charge of filing a false income tax report (Count 37) and two counts of failure to file income tax reports (Counts 38-39). Gross stands convicted of two counts, conspiracy to violate the CTRA (Count 13) and aiding and abetting the violation of the CTRA (Count 15).

After the appeal, Mr. Mohwish brought a collateral attack pursuant to 28 U.S.C. § 2255 in which he requested that his convictions and sentence be set aside because he had been rendered ineffective assistance of counsel. The Magistrate Judge issued an opinion in which he recommended that Mr. Mohwish's motion be denied. (*See* Appendix A.) The district court adopted the Magistrate Judge's recommendation and

denied Mr. Mohwish's motion. (*See* Appendix B.) The district court (*see* Appendix C) and the Sixth Circuit (*see* Appendix D) then denied Mr. Mohwish's applications for a certificate of appealability. This petition now follows.

Facts pertinent to each issue are set forth in each issue below.

V. REASONS FOR GRANTING THE WRIT

A. IT IS *PER SE* REVERSIBLE ERROR TO CONVICT UNDER THE *PINKERTON* DOCTRINE WHEN NO INSTRUCTIONS ARE GIVEN AND WHEN THE CONVICTION RESTS SOLELY ON VICARIOUS LIABILITY.

1. The writ should be granted to resolve a conflict between the circuits.

This Honorable Court should grant certiorari to determine whether it is *per se* reversible error for a district court to fail to instruct a jury on the elements necessary to convict under the *Pinkerton* doctrine when the criminal conviction rests solely on vicarious liability. The United States Circuit Courts of Appeals are in conflict on this issue and a uniform rule should be established. This issue is an important federal question, especially in cases where, as here, no other theory was presented to the jury.

The First, Second, Eleventh and District of Columbia Circuits have ruled that the omission of a *Pinkerton* instruction is *per se* reversible error when a conviction rests on a theory not presented to the jury. The Sixth Circuit in denying a certificate of appealability in this case has implicitly upheld the district court's ruling that an omission of a *Pinkerton* instruction is reviewable in collateral attacks under a harmless error analysis.

2. The district court found that it was harmless error for Joseph Mohwish to be convicted on a vicarious liability theory even though the jury had not been instructed on the *Pinkerton* requirements for vicarious liability.

Joseph Mohwish was charged with engaging in a Continuing Criminal Enterprise ("CCE"). In order to convict him of the CCE (Count 1), the government had to prove that he had committed a "continuing series" of "three" or more related drug felony violations. *United States v. Sinito*, 723 F.2d 1250, 1261 (6th Cir.1983), *cert. denied*, 469 U.S. 817, 105 S.Ct. 86, 83 L.Ed.2d 33 (1984). The indictment also charged various defendants with a drug conspiracy (Count 2) and five substantive drug offenses (Counts 3, 4, 5, 6 and 7). Mr. Mohwish, however, was charged only in Counts 2 and 5, while

co-defendant Patrick was charged in Counts 2, 3, 4, 5, 6 and 7. Mr. Mohwish was convicted on only Count 2; Patrick was convicted on Counts 2, 3, 6 and 7. The government introduced no evidence that Mr. Mohwish had committed any uncharged drug violations and the government introduced no evidence that Mr. Mohwish had aided and abetted any substantive drug offenses. Therefore, to be convicted on the CCE charge, the jury had to have found that Mr. Mohwish was responsible for substantive drug offenses committed by a co-conspirator through vicarious liability based on a *Pinkerton* theory. However, the district court never instructed the jury on the *Pinkerton* requirements for vicarious criminal liability.

After a direct appeal which did not raise this issue, Mr. Mohwish filed a 28 U.S.C. § 2255 motion to vacate his convictions based on ineffective assistance of counsel. In denying the motion, the district court found that a *Pinkerton* error should be categorized as a "trial error" rather than a "structural error," and that a properly instructed jury would have found the *Pinkerton* elements. In so holding, the district court found that the omission of a *Pinkerton* instruction with respect to the CCE count did not have a "substantial and injurious effect or influence in determining the jury's verdict." (Appendix A at 48.) The Sixth Circuit denied Mr. Mohwish's request for a certificate of appealability and thus implicitly upheld the district court's holdings by affirming Mr. Mohwish's

CCE conviction which had been based on a theory not presented to the jury.

3. Circuit Courts' decisions mandating reversal for omission of a *Pinkerton* instruction when the conviction rests solely on vicarious liability.

Contrary to the Sixth Circuit's holding in Mr. Mohwish's case, the First, Second, Eleventh and District of Columbia Circuit Courts of Appeals have held that an omission of a *Pinkerton* instruction is *per se* reversible error when the conviction rests solely on vicarious liability.

In *United States v. Giraldo*, 80 F.3d 667 (2nd Cir.1996), three defendants were convicted of conspiring to distribute narcotics and of using or carrying a firearm during and in relation to narcotics trafficking. Although the Second Circuit found that, "the evidence was sufficient to permit a rational juror to infer beyond a reasonable doubt that Giraldo, Fermin, and Tellez were coconspirators" (*United States v. Giraldo*, 80 F.3d at 674), the court also stated that:

> ... we find in the record no evidence from which the jury could reasonably infer that Giraldo knew there was a gun in the car. Lack of proof of knowledge also forecloses affirmance on an aiding-and-abetting theory. **Since no *Pinkerton***

> **instruction was given, we conclude that the evidence was insufficient to support the convictions** of Giraldo and Tellez under § 924(c) and that **those convictions must therefore be reversed**.

United States v. Giraldo, 80 F.3d at 677 (emphasis added). *See also, United States v. Labat*, 905 F.2d 18, 23 (2nd Cir.1990) ("**the *Pinkerton* theory is not available on this appeal, for the jury was not instructed that it could find Labat guilty of possession on this basis**") (emphasis added).

In *United States v. Torres-Maldonado*, 14 F.3d 95, 100 (1st Cir.1994), the defendant was charged with conspiring to possess cocaine with intent to distribute, possession of cocaine with intent to distribute, and using a firearm during and in relation to a drug offense. Although the First Circuit upheld the conspiracy and possession with intent to distribute convictions, the court found that:

> [w]e begin by noting that, although members of a conspiracy may be held liable for substantive crimes committed by a coconspirator in furtherance of the conspiracy, **the jury in this case was not so instructed**. On appeal, we will not infer either that the jury found guilt based on a theory upon which it was not instructed, or

> that the jury would have found guilt had it been given a *Pinkerton* instruction. **Accordingly, we decline to affirm defendants' firearms convictions on *Pinkerton* grounds**.

United States v. Torres-Maldonado, 14 F.3d at 101 (citations omitted; emphasis added).

In *United States v. Raffone*, 693 F.2d 1343 (11th Cir.1982), *cert. denied*, 461 U.S. 931, 103 S.Ct. 2094, 77 L.Ed.2d 303 (1983), the defendants were charged with a drug conspiracy. One of the defendants was also charged with three counts of drug possession. Although the Eleventh Circuit upheld the possession convictions based on constructive possession and aiding and abetting theories, the court stated that:

> [i]nitially it should be noted that although a conspirator may be held liable for substantive crimes committed by a co-conspirator in furtherance of the conspiracy, **the jury was not so instructed in this case. [The defendant's] conviction cannot, therefore, be sustained on a *Pinkerton* theory**. If appellant's conviction on the substantive counts is to be sustained, evidence must have been submitted to the jury sufficient to support either a constructive

> possession or an aiding and abetting theory as to each count.

United States v. Raffone, 693 F.2d at 1346 (citations omitted; emphasis added).

In *United States v. Brown*, the District of Columbia Circuit Court held that, "[the defendant] replies that a conviction may be upheld under *Pinkerton* only if the court has instructed the jury of the doctrine. We agree." *United States v. Brown*, 823 F.2d 591, 599 (D.C. Cir.1987).

4. United States Supreme Court decisions analyzing vicarious liability.

The United States Supreme Court has ruled in *Pinkerton v. United States*, 328 U.S. 640 (1946) that vicarious criminal liability is permissible, but only under certain conditions. In *Pinkerton*, the defendants were convicted of conspiracy and ten substantive counts of filing false statements to the I.R.S. Although there was no evidence to show that one of the defendants had participated directly in the commission of the substantive offenses, the Court upheld his convictions based on a vicarious liability theory. *Pinkerton v. United States*, 328 U.S. at 645. However, this Court also stated that:

> [a] different case would arise if the substantive offense committed by one of the conspirators was not in fact done in furtherance of the

> conspiracy, did not fall within the scope of the unlawful project, or was merely a part of the ramifications of the plan which could not be reasonably foreseen as a necessary or natural consequence of the unlawful agreement.

Pinkerton v. United States, 328 U.S. at 647.

Three years later, this Court reaffirmed its *Pinkerton* holding in *Nye & Nissen v. United States*, when it stated that:

> [i]n *Pinkerton v. United States, supra*, a conspiracy and substantive offenses were charged. We held that a conspirator could be held guilty of the substantive offense even though he did no more than join the conspiracy, provided that the substantive offense was committed in furtherance of the conspiracy and as a part of it. **A verdict on that theory requires submission of those fact issues to the jury**.

Nye & Nissen v. United States, 336 U.S. 613, 618 (1948) (emphasis added).

A number of years later in *Dunn v. United States*, this Court stated that:

> **[t]o uphold a conviction on a charge that was**

> **neither alleged in an indictment nor presented to a jury at trial offends the most basic notions of due process.** Few constitutional principles are more firmly established than a defendant's right to be heard on the specific charges of which he is accused.

Dunn v. United States, 442 U.S. 100, 106, 99 S.Ct. 2190, 60 L.Ed.2d 743 (1979) (emphasis added).

This tenet was reaffirmed in *Chiarella v. United States*, in which this Court stated that:

> [t]he jury was not instructed on the nature or elements of a duty owed by petitioner to anyone other than the sellers. **Because we cannot affirm a criminal conviction on the basis of a theory not presented to the jury we will not speculate** upon whether such a duty exists. ... **We cannot affirm a criminal conviction on the basis of a theory not presented to the jury**.

Chiarella v. United States, 445 U.S. 222, 236, 237, 100 S.Ct. 1108, 63 L.Ed.2d 348 (1980) (citations omitted; emphasis added).

Based upon the holdings of these Supreme Court

decisions, a conviction based on vicarious liability should not be permitted to stand unless a jury has been properly instructed on the requirements for vicarious liability and the jury has then found the defendant guilty based on that theory. To do otherwise would be to permit a criminal conviction based on a theory not presented to the jury. Thus, it should be *per se* reversible error for a district court to fail to instruct a jury on the elements necessary to convict under the *Pinkerton* doctrine when the conviction rests solely on vicarious liability.

5. Conclusion

This Honorable Court should resolve the conflict between the United States Courts of Appeals and hold that it is *per se* reversible error for a district court to fail to instruct a jury on the elements necessary to convict under the *Pinkerton* doctrine when a conviction rests solely on vicarious liability.

B. *YATES* REQUIRES REVERSAL OF A CCE CONVICTION WHEN JURORS ARE PROVIDED WITH A LIST INCLUDING INDIVIDUALS WHO ARE INELIGIBLE AS A MATTER OF LAW FOR CONSIDERATION AS SUPERVISEES.

1. The writ should be granted to resolve a conflict between the circuits.

This Honorable Court should grant certiorari to determine whether *Yates v. United States*, 354 U.S. 298, 77

S.Ct. 1064, 1 L.Ed.2d 1356 (1957) mandates reversal of a CCE conviction when jurors were provided with a list of individuals that included people who were as a matter of law ineligible for consideration as supervisees. The United States Courts of Appeals are in conflict on this issue and a uniform rule should be established.

The Ninth Circuit has held that the distinction between *Turner v. United States*, 396 U.S. 398, 90 S.Ct. 642, 24 L.Ed.2d 610 (1970) and *Yates v. United States*, *supra* requires reversal of a defendant's CCE conviction when a list of supervisees presented at trial included legally impermissible individuals and no curative instructions were given to ensure that the jurors were adequately advised as to whom the jury could consider as supervisees.

In Mr. Mohwish's case, the Sixth Circuit denied a certificate of appealability and thus implicitly upheld the district court's ruling that it was harmless error when a list of supervisees presented at trial included legally impermissible individuals. The district court based its ruling on *United States v. Chalkias*, 971 F.2d 1206, 1214 (6th Cir.1992), *cert. denied*, 113 S.Ct. 351 (1992) in which the Sixth Circuit held that such an error was harmless.

2. The district court's findings in Joseph Mohwish's case.

The district court found that it was harmless error to give the jury a list of supervisees including individuals who were legally ineligible to be supervisees.

In order to establish a continuing criminal enterprise, the government must prove: (1) that the defendant committed a felony violation of the federal narcotics laws; (2) as a part of a continuing series of federal, felony drug violations; (3) **that were undertaken in concert with five or more persons**; (4) for whom the defendant occupied a position of organizer, supervisor or some other managerial status; and (5) from which the defendant had obtained substantial income or resources. 21 U.S.C. § 848 (c) (emphasis added).

In order to qualify as a "supervisee," the government must prove that an individual acted "in concert with" the defendant and that he or she was somehow "managed" by the defendant. Because of these qualifying requirements, individuals in certain categories cannot, as a matter of law, be considered as "supervisees" in determining the "five person" element of a CCE offense. In particular, individuals who have merely a **buyer-seller** relationship with the defendant, the defendant's **supplier** of narcotics, individuals who are **innocent dupes** and **acquitted co-conspirators** cannot be considered to be "supervisees" as a matter of law. *See Jeffers v. United States*, 432 U.S. 137, 147-150, 97 S.Ct. 2207, 53 L.Ed.2d 168, 178-180 (1977).

At Mr. Mohwish's trial, the government presented a large "C.C.E. organizational chart" to summarize its theory of supervisees. Joseph Mohwish's and Bill Patrick's names were placed at the top in two interlocking circles with all of the other named individuals organized below, based on their alleged relationship to either Mr. Mohwish or Patrick. Trial counsel did not object to the government's list of supervisees or to the chart that was presented to the jury, even though this list included buyers-sellers, suppliers and innocent dupes. Trial counsel did not request and the district court did not give any curative instructions to ensure that the jury was able to make a proper differentiation between those whom it could and those whom it could not consider as supervisees. Furthermore, this issue was not raised on direct appeal.

The jury convicted both Mr. Mohwish and Patrick of engaging in a continuing criminal enterprise. On direct appeal, the Sixth Circuit analyzed the sufficiency of the evidence regarding the various supervisees proposed by the government and rejected as a matter of law one individual who was in a buyer-seller relationship with Patrick or Mr. Mohwish, one individual who was a drug supplier, several individuals who were innocent dupes, and one individual who was an acquitted co-conspirator. *United States v. Patrick*, 965 F.2d at 1396-97.

Therefore, of the many people the government had presented to the jury as potential supervisees, all but four were held to be ineligible as a matter of law.

As a result, the Sixth Circuit reversed Bill Patrick's CCE conviction because the evidence proved that Patrick supervised only four individuals. However, the Sixth Circuit affirmed Joseph Mohwish's CCE conviction because it held that the evidence was sufficient to demonstrate that Mr. Mohwish had supervised those four individuals plus Bill Patrick. *United States v. Patrick*, 965 F.2d at 1397-98.

Mr. Mohwish filed a § 2255 motion in which he claimed that he had been rendered ineffective assistance of counsel because his attorney had failed to raise this issue either at trial or on appeal. The Magistrate Judge denied Mr. Mohwish's § 2255 motion (Appendix A) and the district court adopted the Magistrate Judge's findings (Appendix B). However, Mr. Mohwish's CCE conviction should be reversed because it is impossible to determine whether this conviction rested upon a legally impermissible ground.

3. United States Supreme Court decisions analyzing the distinction between a conviction based on insufficient evidence and a conviction based on a legally inadequate ground.

In *Griffin v. United States*, 502 U.S. 46, 47-48, 112 S.Ct. 466, 468, 116 L.Ed.2d 371 (1991), a defendant was convicted of a conspiracy charging multiple objects, only one of which was supported by the evidence presented at trial. Relying on *Turner v. United States*, 396 U.S. 398, 90 S.Ct. 642, 24 L.Ed.2d 610 (1970), this Court stated that as long as the evidence was sufficient to support one object of the conspiracy, the verdict could stand based on the presumptions that the jurors had followed the instructions they were given and that they were competent to make a reasonable determination as to the sufficiency of the evidence. *Griffin v. United States*, 502 U.S. at 56-57, 112 S.Ct. at 473, 116 L.Ed.2d at 381. *See also, Turner v. United States*, 396 U.S. at 420, 90 S.Ct. at 654 ("when a jury returns a guilty verdict on an indictment charging several acts in the conjunctive ... the verdict stands if the evidence is sufficient with respect to any one of the acts charged").

In contrast, the defendant in *Yates v. United States*, 354 U.S. 298, 77 S.Ct. 1064, 1 L.Ed.2d 1356 (1957) was convicted of a multiple object conspiracy in which one of the objects was legally impermissible. Because the jury was permitted to consider a legally impermissible theory and its verdict may have rested on this unconstitutional ground, the Court held that, "a verdict must be set aside in cases where the verdict is supported on one ground, but not on another, and it is

impossible to tell which ground the jury selected." *Yates v. United States*, 354 U.S. at 312, 77 S.Ct. at 1073. *See also, Griffin v. United States*, 502 U.S. at 55-56, 112 S.Ct. at 477; *Stromberg v. California*, 283 U.S. 359, 368, 51 S.Ct. 532, 75 L.Ed. 1117, 73 ALR 1484 (1931) ("[i]t follows that instead of it being permissible to hold ... that the verdict could be sustained if any one of the clauses of the statute were found to be valid, the necessary conclusion from the manner in which the case was sent to the jury is that, if any of the clauses in question is invalid under the Federal Constitution, the conviction cannot be upheld") and *William v. North Carolina*, 317 U.S. 287, 292, 63 S.Ct. 207, 87 L.Ed. 279, 143 ALR 1273 (1942) ("[t]o say that a general verdict of guilty should be upheld though we cannot know that it did not rest on the invalid constitutional ground on which the case was submitted to the jury, would be to countenance a procedure which would cause a serious impairment of constitutional rights"). These holdings stand for the principle that, "where a provision of the Constitution forbids conviction on a particular ground, the constitutional guarantee is violated by a general verdict that may have rested on that ground." *Griffin v. United States*, 116 L.Ed.2d at 379.

4. Ninth Circuit Decisions holding that it is plain error for a CCE conviction to rest on a list of individuals that included persons who could not, as a matter of law, be supervisees.

In *United States v. Barona*, 56 F.3d 1087 (9th Cir.1995), the Ninth Circuit held that the distinction between *Turner* and *Yates* required reversal of two defendants' CCE convictions because the list of supervisees presented at trial included legally impermissible individuals. The Ninth Circuit reasoned that, because the jury was presented with a legally inadequate as opposed to a factually inadequate theory, *Yates* required reversal because it could not be determined:

> ... whether the jury selected one of the purported supervisees who was actually ineligible under *Delgado* [buyers/sellers are not supervisees]. There were no instructions directing the jury to exclude one who is only a customer. **Lacking some assurance that proper differentiation could be made, the verdicts on counts 27 and 28 [CCE counts for two defendants] must be reversed.**

United States v. Barona, 56 F.3d at 1098 (emphasis added).

Furthermore, in *United States v. Jerome*, the Ninth Circuit held that:

> [t]he failure of the court so to instruct was highly prejudicial, with a high probability of substantially

affecting the jury verdict. Plain error, the failure calls for reversal of [the defendant's] continuing criminal enterprise conviction.

United States v. Jerome, 942 F.2d 1328, 1331 (9th Cir.1991) (citation omitted).

5. Sixth Circuit decisions holding that it is not plain error for a CCE conviction to rest on a list of individuals that included persons who could not, as a matter of law, constitute a supervisee.

In *United States v. Chalkias*, 971 F.2d 1206, 1214 (6th Cir.1992), *cert. denied*, 113 S.Ct. 351 (1992), the Sixth Circuit rejected the Ninth Circuit's ruling that it was plain error for a court to fail to instruct a jury that certain persons cannot count as supervisees. The Sixth Circuit found that it was harmless error when the list of supervisees at trial included legally impermissible individuals as long as there was sufficient evidence for the jury to conclude that there were five individuals controlled by a CCE defendant.

In Mr. Mohwish's case, the Sixth Circuit denied a certificate of appealability of the district court's ruling that *Chalkias* was controlling and that it had not been plain error for the district court to have failed to instruct the jury that certain persons could not count as supervisees.

6. Conclusion

This Court has distinguished between a sustainable conviction dealing only with the sufficiency of the evidence as in *Turner* and a reversible conviction based on a legally impermissible ground as in *Yates*. This Honorable Court should resolve the conflict between the United States Courts of Appeals and hold that a harmless error analysis should not apply when a jury may have convicted a person based on a legally impermissible ground because *Yates* requires reversal under these circumstances.

C. THE DISTRICT COURT COMMITTED REVERSIBLE ERROR IN FAILING TO INSTRUCT THE JURY THAT IT MUST AGREE UNANIMOUSLY ON WHICH PARTICULAR DRUG VIOLATIONS CONSTITUTED THE "SERIES OF VIOLATIONS" REQUIRED FOR CONDUCTING A CONTINUING CRIMINAL ENTERPRISE IN VIOLATION OF 21 U.S.C. § 848.

1. The writ should be granted to resolve a conflict in the circuits.

This issue is presently before the Supreme Court in the case of *United States v. Richardson*, Supreme Court Case No. 97-8629. Mr. Mohwish requests that the Court grant the writ

of certiorari on this issue and hold the matter in abeyance pending the decision in the *Richardson* case.

2. Similarities with the *Richardson* case.

As occurred in *Richardson*, the district court in Joseph Mohwish's case did not instruct the jury that it had to agree unanimously on which particular drug violations constituted the "series of violations" in order to convict Mr. Mohwish of conducting a continuing criminal enterprise in violation of 21 U.S.C. § 848.

3. Differences with the *Richardson* case.

While the *Richardson* case involves a direct appeal and a situation in which the defendant requested a jury instruction telling the jury that it had to agree unanimously on the predicate offenses, Mr. Mohwish's case is an appeal of a collateral attack pursuant to 28 U.S.C. § 2255 and involves a situation in which trial counsel failed to request such a jury instruction.

4. Conclusion

This Honorable Court should resolve the conflict between the United States Courts of Appeals and hold that the district court committed reversible error in failing to instruct the jury that it must agree unanimously on which particular drug violations constituted the "series of violations" required

for conducting a continuing criminal enterprise in violation of 21 U.S.C. § 848.

D. THE SIXTH CIRCUIT COURT OF APPEALS ERRED WHEN IT DENIED JOSEPH MOHWISH'S REQUEST FOR A CERTIFICATE OF APPEAL ON THE ABOVE-STATED ISSUES.

1. Standard of Review

A defendant seeking review of a final order from a motion under 28 U.S.C. § 2255 is now required to request a "certificate of appealability." The requirements of this certificate are set forth in 28 U.S.C. § 2253 which states that an applicant under must make a "substantial showing of the denial of a constitutional right" (28 U.S.C. § 2253(c)(2)), and the certificate "shall indicate which specific issue or issues satisfy the showing required by paragraph (2)."

2. Substantial showing of a denial a constitutional right.

Mr. Mohwish has made a substantial showing that he was denied his constitutional rights in each of the above three issues that he presented to this Court.

3. Conclusion

If this Court does not choose to grant certiorari on any of the above three issues, Mr. Mohwish requests that the Court

order the Sixth Circuit Court of Appeals to issue a certificate of appealability on each of these three issues in order to permit Mr. Mohwish to appeal each of these issues to the Sixth Circuit.

VI. CONCLUSION

For the reasons stated above, a writ of certiorari should be issued to review the matters presented in this petition. In the alternative, if a writ of certiorari is not issued on each of the issues. Mr. Mohwish requests that the case be remanded to the Sixth Circuit Court of Appeals with an order to that court to grant a certificate of appealability on each of the issues.

DATED this 19th day of February, 1999.

Respectfully submitted,

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Attorney for Petitioner

APPENDIX A

FILE STAMPED:
Eastern District of Kentucky
January 6, 1998
at Covington
Leslie G. Whitmer
Clerk, U.S. District Court

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
AT COVINGTON
CRIMINAL ACTION NO. : 88-54
CIVIL ACTION NO. : 97-40

UNITED STATES OF AMERICA,

PLAINTIFF

v.

JOSEPH A. MOHWISH,

DEFENDANT

REPORT AND RECOMMENDATION

Joseph A. Mohwish, currently incarcerated at the Federal Prison Camp in Atlanta, Georgia, and proceeding through counsel, filed this motion to vacate his sentence pursuant to 28 U.S.C. §2255. The United States has filed a response, to which petitioner has filed a reply. Pursuant to local practice, this matter has been referred to the undersigned for initial consideration and a report and recommendation. 28 U.S.C. § 636(b).

I. FACTS AND PROCEDURAL HISTORY

The defendant, Joseph A. Mohwish, was charged along with three other individuals (Delmus Gross, Bill Patrick and Kathy Mohwish), in a multi-count indictment on December 14, 1988. In all, the indictment included a total of thirty-nine (39) counts and spanned 56 pages.

All four defendants including Mohwish were charged with conspiracy to possess with intent to distribute cocaine (Count 2), and conspiracy to violate the Currency Transaction Reporting Act ("CTRA") (Count 13). Mohwish and codefendant Bill Patrick were charged with engaging in a Continuing Criminal Enterprise (CCE) (Count 1) and attempted possession of marijuana (Count 5). Mr. Patrick was charged separately with additional counts involving distribution of controlled substances and interstate travel. Mr. Mohwish and Mr. Gross were charged with 17 counts of aiding and abetting violations of the CTRA (Counts 14-30) and two counts of aiding abetting money laundering (Counts 31-32). Mr. and Mrs. Mohwish were both charged with three counts of filing false income tax reports (Counts 33-35) and one count of failing to file income tax reports (Count 36). The latter (Count 36) was dismissed by the court prior to submission to the jury.

As summarized by the Sixth Circuit:

> Joseph Mohwish and Bill Patrick ran a prosperous drug distribution and money laundering business. Delmus Gross's car dealership was used to launder the drug

> proceeds. It was Patrick's job to secure cocaine and marijuana and to locate buyers. Mohwish coordinated the drug operation with Patrick and stored cocaine. Mohwish also owned a holding company for several of his other corporations, including a window manufacturing firm called Season Sash. Mohwish and Gross used these corporations on behalf of their money laundering activity.

United States v. Patrick, 965 F.2d 1390, 1394 (6th Cir.), cert. denied, 506 U.S. 940 (1992), cert. granted, 507 U.S. 956, amended after remand, 993 F.2d 123 (1993).

Following a jury trial which spanned more than four weeks, Mohwish was acquitted on three counts (Counts 5, 31, and 32), and convicted on Counts 1, 2, 13, 14-30 and 33-35. [Ftn.1] He was subsequently sentenced to a total of twenty (20) years in prison. On direct appeal, the Sixth Circuit Court of Appeals reversed Mohwish's CTRA convictions under Counts 14 and 16-30 of the indictment based on the lack of evidence that the financial institution or its employees had knowledge of the illegal structuring of the currency transactions at issue. United States v. Patrick, 965 F.2d 1390. [Ftn.2] Thereafter, the Supreme Court granted Mohwish's petition for writ of certiorari and remanded to the Sixth Circuit for further consideration. 507 U.S. 956. On remand, the Sixth Circuit reversed Mohwish's conviction under Count 2 of the indictment on the grounds that it was a lesser included offense of the CCE conviction. 993 F.2d 123.

> [Ftn.1: Codefendant Kathy Mohwish was acquitted of all charges, while codefendants Bill Patrick and Bunt Gross were convicted in part and acquitted in part.]

> [Ftn.2: The court also reversed various codefendant's Patrick's and Gross's convictions. This court recently granted Patrick's motion to vacate a special assessment imposed against him on Count 1, but denied Patrick's motion to vacate his sentence on all other grounds. [Doc. #522, May 20, 1997].]

Mohwish presently stands convicted of six charges: organizing a continuing criminal enterprise (Count 1), conspiracy to violate the CTRA (Count 13), aiding and abetting a violation of the CTRA (Count 15), and three counts of filing false income tax reports (Counts 33-35). Despite the number of Mohwish's convictions which have been reversed by the appellate courts, Mohwish's total sentence (which involved multiple concurrent terms) has remained at 20 years imprisonment.

In the lengthy [Ftn.3] §2255 motion at issue in this proceeding, Mohwish raises a number of ineffective assistance of counsel claims, arguing that trial counsel was ineffective for failing to object to a number of jury instructions, and that appellate counsel was likewise ineffective.

> [Ftn. 3. Counsel for Mohwish requested and was granted permission to file oversized briefs in support of the motion to vacate and in reply to the Government's response. The memorandum in support of the motion to vacate alone weighs in at 80 pages, while the reply memorandum is a relatively succinct 21 pages.]

II. ANALYSIS

Mohwish argues that trial counsel committed a number of constitutionally prejudicial errors by failing to object to various jury instructions. Mohwish argues that counsel should have objected to the jury instructions on each of the charges on which his convictions remain: the CCE charge (Count 1), the general conspiracy charge (Count 13), the CTRA charge (Count 15), and the tax count charges (Counts 33-35). In addition, Mohwish argues that counsel committed prejudicial error by failing to request a general unanimity instruction, and by failing to rebut testimony by a government witness. Mohwish argues that the cumulative effect of all of the alleged errors rendered his trial fundamentally unfair. Finally, Mohwish argues that appellate counsel was constitutionally ineffective for failing to raise on appeal all of the issues relating to the allegedly deficient jury instructions, as well as the alleged deficiencies in trial counsel's performance. Following a brief review of procedural issues, each of Mohwish's claims will be addressed in seriatim.

A. Mohwish is not procedurally barred from raising his claims

Prior to addressing Mohwish's claims on their merits, the court must briefly address two procedural issues raised by the Government in its response to the §2255 motion. The

Government first argues that this court should not reach any of the claims brought by Mohwish in this proceeding, because Mohwish has previously abused the litigation process in this court in other proceedings. I disagree.

As previously stated in the court's Memorandum Order of September 26, 1997:

> At the outset, the court rejects the Government's argument that Mohwish's claims are barred from review by this court due to an injunction issued in Mohwish v. Forester, Lexington Civil Action No. 95-46. The United States, noting Mohwish's extensive litigation history in this court, urges the court to refuse to review Mohwish's §2255 motion on the grounds that it is related to that prior civil litigation.
>
> Mohwish's litigious history is briefly catalogued in a Memorandum Opinion and Order filed in that case, which involved criminal allegations against various judges who presided over his criminal prosecution and affirmed his conviction. [Ftn. 4] Mohwish v. Forester, Lex. Civil Action No. 95-46 [Doc. #119, August 30, 1996]. In that case, the court noted that Mohwish had filed 69 motions, 14 notices and 7 sets of objections in that civil action alone, and was simultaneously proceeding in four other civil actions and one criminal action. Based upon a finding that Mohwish's civil actions evidenced a pattern of abusive filings in this court, the district court ordered the Clerk of the Court not to file any future documents relating to Civil Action No. 95-46.

[Ftn.4: The court notes that Civil Action No. 95-46 was originally filed as a petition for write of habeas corpus. However, the Government makes no claim that the present §2255 motion should be barred by the doctrines of res judicata, collateral estoppel, or that it constitutes a successive petition or abuse of the writ.]

Contrary to the Government's argument, this §2255 motion does not appear to "relate to" Mohwish's Lexington Civil Action No. 95-46 or Mohwish's previous civil actions. It must first be noted that Mr. Mohwish proceeded pro se in his prior civil actions, and it is unclear whether the district court's injunction in Lexington Civil Action No. 95-46 could be applied against counsel in this case. [Ftn.5] However, even if the order could be applied against counsel, it does not apply in this case because Mohwish's collateral attack on his criminal conviction does not sufficiently "relate to" the prior litigation. As counsel for Mohwish notes, it is a basic tenant of criminal jurisprudence that prisoners have constitutional right of access to the courts for collateral review of their criminal convictions. See Smith v. Bennett, 365 U.S. 708. 712 (1961). The court's prior injunction is not so broadly drafted as the Government would propose, and does not prohibit Mohwish from collateral review of his conviction.

[Ftn.5: As noted by the court in Civil Action No. 95-46, one of the factors to be considered in enjoining a vexatious litigant is whether the litigant is represented by counsel. [Doc. 119, p. 4] (citations omitted).]

[Doc. #537]. In the Court's prior Memorandum Order, the court also rejects the Government's second procedural argument.

> Mohwish's underlying claims all involve claims of ineffective assistance of trial and/or appellate counsel. In addition to its argument that this court should not review the §2255 motion at all, the Government argues that the claims are procedurally barred based upon Mohwish's failure to raise the issues on direct appeal. See United States v. Frady, 456 U.S. 152, 167-168 (1982).
>
> Once again, the court must reject the Government's procedural argument. In the Sixth Circuit as in other Circuits, ineffective assistance of counsel claims are not generally cognizable on direct appeal and are properly raised in the first instance in a collateral proceeding. See e.g., United States v. Carr, 5 F.3d 986, 993 (6th Cir. 1993); United States v. Wunder, 919 F.2d 34, 37 (6th Cir. 1990). The Government argues that the policies underlying this general rule do not apply to Mohwish's case; however, the court concludes that the law of the Sixth Circuit does not support the Government's argument. Therefore, Mohwish is not procedurally barred from raising his ineffective assistance of counsel claims.

[Id.]. Having rejected the Government's two procedural arguments, the court turns to the merits of Mohwish's §2255 motion.

B. The Merits

In Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052 (1984), the Supreme Court held that a defendant alleging ineffective assistance of counsel must prove both that his counsel's performance was deficient, and that the defendant was prejudiced by the deficient performance. Moreover, there is a "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. . . ." Id., at 2066. In Lewis v. Alexander, 11 F.3d 1349, 1352 (6th Cir. 1993), the Sixth Circuit reiterated the Strickland standard as requiring a petitioner to bear

> the heavy burden of demonstrating that counsel made an error so serious that he was not functioning as counsel guaranteed by the Sixth Amendment and that this deficient performance prejudiced his defense. In other words, the issue is 'whether counsel's performance was so manifestly ineffective that defeat was snatched from the hands of probably victory.'

Id. (quoting United States v. Morrow, 977 F.2d 222, 229 (6th Cir. 1992) (en banc), cert. denied, 113 S.Ct. 2969 (1993) (emphasis in original)). Having set forth the appropriate standard, the court now turns to Mohwish's specific claims of error.

1. The Continuing Series of Violations on the CCE Charge (Count 1)

Mohwish raises a number of arguments pertaining to the jury instructions which were given on his conviction under 21

U.S. C. §848 for engaging in a continuing criminal enterprise. To establish a continuing criminal enterprise, the Government was required to prove the following essential elements: (1) that the defendant committed a felony violation of the federal narcotics laws; (2) as a part of a continuing series of federal, felony drug violations; (3) that were undertaken in concert with five or more persons; (4) for whom the defendant occupied a position of organizer, supervisor or some other managerial status; and (5) from which the defendant had obtained substantial income or resources. 21 U.S.C. §848(c) (1988); see also United States v. Sinito, 7123 F.2d 1250, 1261 (6th Cir. 1983), cert. denied, 469 U.S. 917 (1984); United States v. Davis, 8098 F.2d 1194, 1204 (6thCir. 1987), cert. denied, 483 U.S. 1007 (1987). Mohwish's arguments primarily concern the court's instructions to the jury on two elements of the offense: the "continuing series of . . . violations" elements, and the element requiring a finding that he supervise "five or more persons." Mohwish also argues that the instructions on the CCE count impermissibly broadened the charge in the indictment.

a. Defining Predicate Offenses

Mohwish argues first that the counsel should have objected to the jury instructions regarding the "continuing series of violations" or predicate offenses element of the CCE

charge. Mohwish contends that the Government misstated the law during closing argument by advising the jurors that they could consider "money laundering" acts as predicate violations, when in fact only Title 21 drug offenses are eligible under the statute. The prosecutor argued:

> It's a continuing criminal enterprise and it's the very first count of the indictment and it charges only Patrick and Mohwish, Joe Mohwish, and to conclude that, you have to conclude that they're guilty of the drug offenses - in essence, the conspiracy - that what you have found them guilty of was part of a series of violations, which is defined as at least three. And by violations, I'm not talking about charges, they're talking about each separate criminal act, even though there are more than three charges, and every time cocaine is delivered, *every time money is laundered for cocaine, that's a violation.*

[Vol. XVIII at 47 (emphasis added)].

Mohwish argues that the Government exacerbated this error by subsequently advising the jury that acts of "money laundering" included all acts charged in Counts 13-36. (Vol. XVIII at 14]. However, having reviewed the full transcript of closing argument, the undersigned concludes that the prosecutor's later reference in closing argument to the money laundering counts clearly differentiated between the "drug conspiracy" which included the CCE charge, and the " conspiracy to launder money" charged in Count 13. Therefore,

the only occasion on which the prosecutor improperly implied that money laundering could constitute a predicate offense for purposes of the CCE charge occurred in the reference quoted above.

The district court began its instructions on the CCE count by reading the relevant portion of the statutory definition of the offense, including language limiting predicate offenses to those committed in violation of Title 21. K [Vol. XIX at 10]. The court then gave the following instructions regarding the "continuing series of violation" element:

> The essential elements of the offense charged in Count One, . . . , as to each offense are as follows: First, that the Defendants Bill J. Patrick and Joseph A. Mohwish committed the so-called conspiracy offense charged in Count Two, or the so-called offense of attempting to possess marijuana with the intent to distribute same as charged in Count Five, or the so-called offense of distributing cocaine as charged in any one of Counts Three, Four, Six and Seven or any combination of these offenses; and second, that the violation of any of the offenses charged in the above-named counts by Defendants Bill J. Patrick and Joseph A. Mohwish are part of a continuing series of violations by them of federal narcotics law. . . .
>
> I will now discuss in more details and define for you the meaning of certain terms used in the statute and in these instructions relating to the five elements of the so-called continuing criminal enterprise offense charged in Count One.

The first element under this count is the determination by you beyond a reasonable doubt that Defendants Bill J. Patrick and Joseph A. Mohwish are guilty under any of Counts Two, Three, Four, Five, Six and Seven, according to the instructions I will give you under those counts. If you determine that Defendants Bill J. Patrick and Joseph A. Mohwish are guilty of any of these counts, you must determine next the second element of Count One, namely whether the violation or violations are part of a continuing series of violations of the federal drug laws.

I charge you that the term "series" generally means three or more and that the term "continuing" means enduring . . . Thus, you must find beyond a reasonable doubt that the defendants Bill J. Patrick and Joseph A. Mohwish committed three or four successive violations of the federal drug laws over a definite period of time with a similar or substantially similar purpose.

Thus, you must find beyond a reasonable doubt that Defendants Bill J. Patrick and Joseph A. Mohwish are guilty as charged in any one of counts Two, Three, Four, Five, Six and Seven, and that the conduct charged in any of these counts together with additional violations of the drug laws constituted a total of three or more violations of the federal drug laws committed over a period of time with a single or similar purpose. This will constitute a finding that Defendants Bill J. Patrick and Joseph A. Mohwish engaged in a continuing series of violations.

[Vol. XIX at 10-12].

Mohwish contends that the above instructions, together with the prosecutor's reference to money laundering, improperly informed the jury that they could convict him of a CCE for any violations of "federal drug laws" and "additional violations of the drug laws" without appropriately limiting those terms to Title 21 offenses. Mohwish argues that the jury may have convicted him by using as predicate offenses the money laundering counts, which are insufficient as a matter of law to support a conviction of a CCE. Mohwish contends that his attorney's failure to object to the prosecutor's closing argument or the jury instructions was Strickland error. According to Mohwish, the district court should have specifically instructed the jury that it could not consider the Title 18, Title 26, and Title 31 offenses for which Mohwish was charged as predicate offenses under §848.

I disagree. A clear reading of the complete jury instructions in context indicates that he phrases "federal narcotics law" and "violations of drug laws" refers to the Title 21 violations charged in Counts 2-7 as " the above-named counts." See also United States v. Kramer, 955 F.2d 479, 487 (7th Cir.), cert. denied, 506 U.S. 998 (1992) (upholding CCE conviction based upon predicate acts "together with any additional violations of the drug laws"). Because I do not find the instructions to contain the breadth of ambiguity argued by

Mohwish, I do not find it error for counsel to have failed to object to the instructions as given. Nor do I find that otherwise clear instructions become ambiguous when read in conjunction with the prosecutor's reference in closing argument to money laundering offenses as providing a basis for the CCE conviction. Although the prosecutor's statement appears erroneous, it was a relatively fleeting and singular reference in the first closing argument presented, on a day when the jury listened to nearly seven hours of closing arguments in concluding a month-long trial. The jury was subsequently provided with accurate instructions.

Even if Mohwish had been able to show that it was error for his attorney to fail to object to the instructions as given or to propose additional instructions to define the predicate offenses for the CCE conviction, Mohwish cannot show that the error was so prejudicial as to render his counsel's assistance ineffective under the Sixth Amendment. Thus, Mohwish cannot show with a reasonable probability that , but for the error, the result of the proceedings would have been different. See Strickland, 466 U.S. at 694.

b. The Absence of a Pinkerton Instruction

Mohwish also argues that his attorney committed prejudicial error by failing to request a Pinkerton instruction. Through acquittal and appeal, Mohwish does not stand personally convicted of three predicate offenses under Title 21

sufficient to support his CCE conviction. He concedes that the may be held vicariously liable on Count 1 for the substantive Title 21 offenses committed by his co-conspirator, Patrick, see Pinkerton v. United States, 328 U.S. 640 (1946), but argues that he was improperly convicted because his attorney failed to request a Pinkerton instruction and none was given. See United States v. Graewe, 774 F.2d 106, 107-108 (6th Cir. 1985). Mohwish contends that the given instructions implied that the jury could convict him under Count 1 solely by finding that co-defendant Patrick committed Title 21 violations, without additional findings that Patrick's substantive offenses were committed while Mohwish was a member of the conspiracy, in furtherance of that conspiracy, and that the offenses were reasonably foreseeable as a necessary or natural consequence of the conspiratorial agreement.

The district court did give the jury a specific Pinkerton instruction concerning the CTRA conspiracy charge in Count 13, [Ftn.6] but did not give the same instruction concerning Count 1.

> [Ftn.6: Mohwish complains that even the Pinkerton instruction given with respect to Count 13 was deficient. Mohwish relies in part on Pattern Jury Instructions of the District Judges Association of the Sixth Circuit, published in 1991 - two years after his trial. However, virtually identical instructions to those given here have been upheld by other courts. See United States v. Zabic, 745 F.2d 464, 474-75 (7th Cir. 1984).]

Although the Government inexplicably [Ftn.7] fails to address the Pinkerton argument, I conclude that counsel's failure to request the instruction was not error. Mohwish's Pinkerton argument assumes that the only way in which his conviction of a CCE can stand is through Pinkerton liability. However, many courts including the Sixth Circuit have held that a defendant may be convicted under the CCE statute based upon predicate violations not charged or even set forth in the indictment, regardless of whether the predicate violation led to a conviction. See e.g., United States v. Paulino, 935 F.2d 739 (6th Cir.), cert. denied, 502 U.S. 914 (1991); United States v. Alvarez-Moreno, 874 F.2d 1402, 1408 (11th Cir. 1989); cert. denied, 494 U.S. 1032 (1990); United States v. Apodaca, 843 F.2d 421 (10th Cir.), cert. denied, 488 U.S. 932 (1988). Moreover, one of the predicate violations of the drug laws may be a conspiracy under 21 U.S.C. §846. See United States v. Ricks, 882 F.2d 885, 891 (4th Cir. 1989), cert. denied, 493 U.S. 1047 (1990). The fact that Mohwish's conviction for conspiracy was set aside on other grounds does not eliminate its availability was a predicate offense, and in fact strengthens the conclusion that the jury actually found three predicate offenses committed by Mohwish for the CCE conviction.

> [Ftn.7: The Government's 24 page response to Mohwish's 13 page motion and 80 page brief fails to address several other arguments as well, and is remarkably scarce in citation to countervailing authority in response to Mohwish's arguments.

> Although brevity is ordinarily commendable, in this case it appears to have been at the expense of completion.]

However, even assuming that the failure of Mohwish's attorney to request a specific Pinkerton instruction with respect to Count 1 was error, I conclude that the error was not so prejudicial under Strickland as to require setting aside the CCE conviction.

Mohwish argues that prejudice must be presumed and reversal is mandated because the court cannot determine whether the jury substantially answered the Pinkerton prerequisites adversely to him. Mohwish relies heavily on a Second Circuit case - Peck v. United States, 73 F.3d 1220, 1229 (2nd Cir. 1995) - without noting that the case has been reversed. In fact, the subsequent opinions in Peck are instructive, although not binding on this court.

In Peck I on which Mohwish relies, a petitioner was granted habeas corpus relief from a conviction on two counts of structuring cash transactions to evade bank reporting requirements, on grounds that the trial court's failure to instruct that a defendant must know that structuring was illegal rendered the conviction fatally defective. In Peck I, the court granted relief to the defendant under 28 U.S.C. §2255 on grounds that the jury had not "substantially answered the [scienter] question adversely to him in the course of its actual deliberations." 73 F.3d at 1228.

The Second Circuit thereafter voted to rehear Peck I in banc to consider "the harmless error analysis applicable on review of a collateral attack upon a conviction obtained after a jury charge that, in conformity with then prevailing law, . . . did not include an aspect of the mental state necessary for conviction. . . . " Peck II, 102 F3d 1319 (2nd Cir. 1996). However, following oral argument but prior to the court's decision, the Supreme Court clarified the applicable harmless error analysis in California v. Roy, 117 S.Ct. 337 (1996). Therefore, the in banc court dissolved itself and returned the case for reconsideration by the original panel. 102 F.3d at 1320.

Upon reconsideration, the panel denied §2255 relief. Peck v. United States, 106 F.3d 450 (2nd Cir. 1997) (hereinafter "Peck III"). The court concluded in light of Roy that the error in the jury instructions "did not have a '"substantial and injurious effect or influence in determining the jury's verdict,"' Brecht v. Abrahamson, 507 U.S. 619, 637 (1993)." Id. At 451. (additional citation omitted).

As did the court in Peck III, I conclude that the Pinkerton error presented by Mohwish in this case (assuming without concluding that it is error at all) should be categorized as a "trial error" rather than a "structural error" which infect the entire trial process. Id. at 454; see also Brecht, 507 U.S. at 629-30. The standard for reviewing a trial error presented on

collateral attack (as opposed to direct appeal) is one of harmless error. Contrary to Mohwish's argument, I further conclude that the application of this standard does not require the court to determine whether the jury actually resolved the missing Pinkerton elements, but instead whether a properly instructed rational jury would have found the missing elements. Peck III, 106 F.3d at 450. Reviewing the record as a whole, including the entire set of jury instructions and the jury finding, I conclude that a properly instructed jury would have found the Pinkerton elements, and therefore that the omission of a Pinkerton instruction with respect to the CCE count did not have a "'substantial and injurious effect or influence in determining the jury's verdict,'" Brecht v. Abrahamson, 507 U.S. 619, 637 (1993).

c. Unanimity on the Predicate Offenses

Mohwish further complains that his attorney committed Strickland error by failing to request a specific unanimity instruction for the three predicate offenses which formed the basis of his CCE conviction on Count 1. The Third Circuit in United States v. Edmonds, 80 F.3d 810, 836 (3rdCir.), cert. denied, 117 S.Ct. 295 (1996) held that, at least in some cases, unanimity on the identity of the predicate acts constituting the "continuing series of violations" is required.

Although Mohwish argues that his trial counsel committed constitutional error by failing to request a specific

unanimity instruction under the Third Circuit decision, it hardly needs stating that the Third Circuit's decisions are not binding in this circuit. Moreover, other circuits have more recently held that unanimity on the underlying three predicate offenses is not required. See e.g. United States v. Canino, 949 F.2d 928, 948 (7th Cir. 1991), cert. denied, 504 U.S. 910 (1992); United States v. Anderson, 39 F.3d 331, 350-51 (D.C. Cir. 1994), vacated and reh'g en banc granted, rev'd in part, 59 F.3d 1323 (1995); United States v. Hernandez-Escarsega, 886 F.2d 1560, 1572-73 (9th Cir. 1989), cert. denied, 497 U.S. 1003 (1990) (declining to rule on question of whether specific unanimity instruction is required). In the absence of controlling Sixth Circuit case law and subsequent case law rejecting the Third Circuit's view, Mohwish's trial counsel's failure to request a specific unanimity instruction cannot be said to amount to error, much less Strickland error.

2. Supervisees Under the CCE Charge (Count 1).

In addition to the alleged errors concerning the type of predicate acts necessary to constitute the "continuing series of violations" element of a CCE Mohwish argues that a number of errors were made by trial counsel concerning the "supervisees" element. Specifically, Mohwish contends that counsel erred by failing to object to a list of "supervisees" proposed by the Government, by failing to request an

instruction defining "supervisees," and by failing to request a unanimity instruction for the "supervisees" element of the CCE offense.

To support a conviction under Count 1, the jury was required to find that Mohwish supervised at least five persons. However, only certain persons could qualify as "supervisees" under the statute. Mohwish charges that his attorney committed error by failing to object to an erroneous list of supervisees presented to the jury by the Government who were as a matter of law ineligible for consideration as "supervisees." Mohwish further argues that trial counsel should have requested an instruction to advise the jury that certain categories of people, such as "mere buyers," "suppliers," "innocent dupes" and "acquitted co-conspirators," could not be considered to be supervisees, and that various persons advanced by the prosecution as "supervisees" were ineligible for consideration as a matter of law.

During closing argument, the Government referred to a chart containing a list of people whom it implied [Ftn.8] were supervised by defendants Mohwish and Patrick during the course of the drug conspiracy. The chart, titled "CCE Organization Chart," was presented during the Government's case in chief, and included a list of persons allegedly supervised by Mr. Mohwish or Mr. Patrick. Trial counsel failed to object to that portion of the Government's closing or to the chart, even though the chart included individuals who were ineligible as a

matter of law for consideration as supervisees.

> [Ftn.8: Mohwish argues that the prosecutor specifically [mis]identified in closing argument persons who could not legally qualify as supervisees. Having reviewed the closing argument, I disagree. The prosecutor used specific names only in the context of reviewing the testimony of various witnesses. References to supervisees were general and did not include any names.
>
> Referring to a number of people presumably identified in the subject chart, the prosecutor argued that the proof showed that Bill Patrick was "the person who exercised control over their activities." [Doc. XVIII, p. 18]. In subsequent argument concerning the CCE offense, the prosecutor specifically stated:
>
> > "You saw our first chart on all those people and that Mohwish and Patrick undertook it as an organizer or supervisor and that doesn't mean, say that they sat down and dictated each and every move of each and every subordinate, for this enterprise is run no differently than any other business. You have your top dogs and you have your little dogs and the little dogs are doing the top dogs' bidding, but not always under specific instruction. This is no different than any other – that they supervised, organized, put it together and made it work and enabled all these other folks to carry out these businesses involved in drugs and money laundering and that they obtained substantial money from doing it.
>
> [Vol. XVIII, p. 48].]

The district court instructed the jury:

The third requirement is that Defendants Bill J.

> Patrick and Joseph A. Mohwish committed these violations in concert with five or more persons. It is not required that the five or more persons be engaged with the Defendants Bill J. Patrick and Joseph A. Mohwish in the commission of the continuing series of violations at the same moment or that all five were present at the same time or that all five were present at the same place. It is not required that Defendants Bill J. Patrick and Joseph A. Mohwish acted in concert with five or more persons in the commission of any single offense that is one of the series of offenses constituting the continuing criminal enterprise.

[Vol.. XIX at 13). The jury instructions themselves did not contain any list of supervisees. On direct appeal, the Sixth Circuit analyzed the sufficiency of the evidence regarding the various supervisees and rejected as a matter of law certain of the persons presented to the jury by the Government. United States v. Patrick, 965 F.2d at 1396-97. The court reversed Bill Patrick's CCE conviction because the evidence demonstrated that he supervised only four individuals, but affirmed Mohwish's conviction because the evidence was sufficient to demonstrate that he supervised five eligible individuals.

Mohwish now argues that his trial counsel was ineffective for failing to object to the overly inclusive list of supervisees presented by the Government, and by failing to request a curative instruction to clarify that certain persons suggested by the Government could not, as a matter of law,

constitute supervisee for purposes of the CCE conviction. Mohwish argues that because the jury may have convicted him based upon his supervision of a person who could not, as a matter of law, constitute a supervisee, then his CCE conviction must be reversed. See United States v. Barona, 56 F.3d 1087, 1097-98 (9th Cir. 1995), cert. denied, 116 S.Ct. 814 (1996) (reversing CCE convictions where jury instructions did not exclude certain individuals, and it could not be determined whether jury relied on persons ineligible to be supervisees as a matter of law).

Mohwish concedes that the Sixth Circuit has never specifically held that a defendant is entitled to such a curative instruction. In fact, in United States v. Chalkias, 971 F.2d 1206, 1214 (6th Cir. 1992), cert. denied, 113 S.Ct. 351 (1992), the Sixth Circuit rejected the Ninth Circuit's related ruling that it is plain error for a court to fail to instruct a jury that certain persons cannot count as supervisees. See also United States v. Robinson, 96 F.3d 1449 (6th Cir. 1996) (Table, unpublished, text available on Westlaw) (affirming CCE conviction even where the evidence was insufficient to show that certain individuals argued by the prosecutor were "supervisees").

In addition, the jury was specifically instructed that they were not to consider the lawyers' arguments as evidence. [Ftn.9: [Vol. XIX at 8.]] In light of the law of the Sixth Circuit

and the facts presented, including the fact that the instructions given were not erroneous, I conclude that trial counsel did not commit error by failing to object to the Government's chart and closing argument, or by failing to propose additional instructions limiting or excluding certain categories of persons as "supervisees."

Even if it were error, however, the Sixth Circuit has already determined on direct appeal that there was sufficient evidence for the jury to conclude that there were five individuals controlled by Mohwish. Patrick, 965 F.2d at 1397-98. In light of the evidence against Mohwish, he cannot show a reasonable probability that the result of the proceeding would have been different but for counsel's alleged errors.

Finally, Mohwish contends that trial counsel was ineffective for failing to request a unanimity instruction pertaining to the five supervisees. However, the Sixth Circuit plainly stated on direct appeal that "[t]he identity of the five persons chosen by the jury need not be unanimously agreed upon." Patrick, 965 F.2d at 1396 (citing United States v. English, 925 F.2d 154, 157-59 (6th Cir.), cert. denied, 501 U.S. 1210 (1991). Therefore, trial counsel's failure to request such an instruction was not error.

3. Specific Intent Charged in the Indictment for the CCE Count (Count 1)

Mohwish argues that because the indictment charged him with having "unlawfully, willfully, knowingly and

intentionally" committed a CCE, the jury should have been specifically instructed that they had to find the same intent in order to convict on Count 1. Mohwish argues that his trial counsel's failure to request that instruction was Strickland error.

Although the CCE statute does not contain any mens rea, Mohwish argues that to convict him without requiring the mens rea listed in the indictment amounted to an unconstitutional modification or broadening of the indictment in violation of the Fifth Amendment. However, as the Sixth Circuit clearly stated in rejecting a similar argument, "There is a wealth of federal case law to the effect that overstatement of the pertinent mens rea in an indictment is 'mere surplusage' that neither obligates the prosecutor to prove more than the law requires nor obligates the trial judge to misinstruct the jury." Warner v. Zent, 997 F.2d 116, 130 (6th Cir. 1993), cert. denied, 510 U.S. 1073 (1994) (citations omitted).

Despite the lack of a specific instruction on the CCE count, the jury was instructed that:

> An act is done knowingly if done voluntarily and intentionally and not because of mistake or accident or other innocent reason. The purpose of adding the word knowingly is to ensure that no one will be convicted for an act done because of mistake or accident or other innocent reason.

> As stated before, with respect to offenses such as charged in this case, specific intent must be proved beyond a reasonable doubt before there can be a conviction.
>
> The crimes charged in this case are serious crimes which required proof of specific intent before the defendant can be convicted. Specific intent, as the term implies, means more than the general intent to commit the crime. To establish specific intent, the Government must prove that the defendant knowingly did an act which the law forbids, purposely intending to violate the law.

[Vol. XIX, pp. 7-8]. Thus, viewing the instructions as a whole, the jury was correctly instructed as to the relevant mens rea required to find that Mohwish committed a CCE, and trial counsel did not err by failing to object to the instructions as given.

4. Failure to Request a General Unanimity Instruction

In addition to arguing that he was rendered ineffective assistance of trial counsel based upon counsel's failure to request specific unanimity instructions, Mohwish argues that his trial counsel was ineffective based upon his failure to request a general unanimity instruction as to all counts.

At the end of the jury instructions, the court instructed the jury as follows:

> You will take the verdict form to the jury room and when you have reached unanimous agreement as to your verdict, you

> will have your foreperson fill it in, date and sign the form, state the verdict upon which you unanimously agreed and then return with your verdict to the courtroom.

[Vol. XIX at 52]. The court also addressed the jury once it had reached its verdict by inquiring "Has the jury reached a unanimous verdict?"

Mohwish argues that the court's unanimity instruction was insufficient to advise the jury that its verdict must be unanimous, although he cites no authority to support his position that the given instruction was somehow deficient. While better unanimity instructions may exist, I conclude that the general unanimity instruction given by the court was constitutionally adequate. Therefore, it was not error for trial counsel to fail to object to the instruction as given.

5. General Conspiracy Charge (Count 13)

Mohwish argues that his conspiracy conviction under Count 13 should be reversed because the jury instructions were legally insufficient as to three out of the six objects of the alleged conspiracy. Mohwish contends that because the jury was instructed that it could convict him on Count 13 if it unanimously found that he had committed any one of the six listed objects, his conviction must be set aside if any one of the objects is legally insufficient. See United States v. Palazzolo, 71 F.3d 1233, 1237 (6th Cir. 1995) (holding that general

conspiracy verdict must be set aside where it was impossible to determine whether the jury based its verdict on admittedly erroneous instruction concerning one of three substantive offenses).

As with Mohwish's other claims, Mohwish can present this claim only by bringing it under the rubric of ineffective assistance of counsel claim; otherwise, the claim is procedurally barred based upon Mohwish's failure to bring it on direct appeal. Mohwish contends that his trial counsel was ineffective for failing to challenge three of the objects of the conspiracy charged in the indictment, and for failing to object to the jury instructions concerning the same three objects.

The §371 conspiracy charged in Count 13 alleged six objects of the conspiracy. The three objects which Mohwish challenges in this proceeding are:

> 4. To knowingly and willfully file false and fraudulent United States Individual Income Tax Returns, Form 1040's and to aid, abet and cause the preparation and filing of false and fraudulent United States Individual Income Tax Returns, Form 1040's of others in violation of Title 26, United States Code, Section 7206(1).
>
> 5. To knowingly and willfully conduct financial transactions involving t he proceeds of the sale and distribution of controlled substances while knowing the property involved in the financial transaction represents said proceeds and knowing that the transaction is designed in whole or in part to avoid a transaction reporting requirement under Federal

> law, in violation of Title 18, United States Code Section 1956(a) (1) (B) (ii).
>
> 6. To knowingly engage in monetary transactions in criminally derived property that is of a value greater than $10,000.00 and derived from the sale and distribution of a controlled substance in violation of Title 18, United States Code Section 1957(a).

[Indictment at 18].

With respect to object #4, Mohwish argues that none of the 49 overt acts listed in the indictment were allegedly done in furtherance of that object. Since no overt act was alleged in furtherance of object #4, Mohwish argues that object #4 was legally deficient. The Government responds that the object itself alleges the overt act in furtherance of the object; namely, the filing of false and fraudulent income tax returns.

Mohwish gives no citation for his argument that, in essence, an overt act cannot be alleged as part of the object charged in the indictment, and this court has found no such authority. Therefore, the court concludes that trial counsel did not err in failing to challenge the indictment or jury instructions on this ground.

Mohwish also argues that object #5 is legally deficient because it refers to "financial transactions" in violation of 18 U.S.C. §1956 (a) (1) (B) (ii) without including the statutory definition of the term provided in 18 U.S.C. § 1956 (c) (4), as

"a transaction which . . . affects interstate or foreign commerce." Similarly, object #6 alleges that Mohwish conspired to commit "monetary transactions" in violation of 18 U.S.C. § 1957 (a) without including the statutory definition of that term provided in 18 U.S.C. § 1957 (f) (1). In addition, object #6 in the indictment does not allege that the offense was committed in the United States or that Mohwish was a United States citizen, as required by 18 U.S.C. § 1957 (d).

The government responds that neither object #5 nor object #6 is defective for failing to include statutory language defining the transaction as one "affecting interstate or foreign commerce," because that language is not an essential element of the crime. Mohwish argues that the language does denote an essential element, because without such a requirement, there would be no federal jurisdiction over the act. United States v. Lopez, 514 U.S. 549 (1995).

The Sixth Circuit has not yet ruled on whether or not the "interstate commerce" language in 18 U.S.C. § § 1956 and 1957 simply states a jurisdictional requirement, or whether it also denotes an essential element of those statutory offenses. The majority of courts have concluded that the "affecting interstate or foreign commerce" requirement is "both jurisdictional and an essential element of the offense." United States v. Allen, ____ F.3d ___, 1997 WL 716081 (10th Cir. 1997) (collecting cases under 18 U.S.C. § 1957). However, it

is not clear that the same proof is required for a conspiracy charge. See United States v Leslie, 103 F.3d 1093, 1101 (2d Cir.), cert. denied, 117 S.Ct. 1713 (1997) (interstate commerce requirement both essential element and jurisdictional for substantive count under 18 U.S.C. § 1956, but not for conspiracy).

Assuming that the interstate commerce requirement is an essential element, however, only a de minimis effect on interstate commerce is required. Where proof of the requisite nexus is overwhelming and undisputed, the conviction will be affirmed even in the absence of appropriate instructions. See, e.g., United States v. Ripinsky, 109 F.3d 1436, 1443-45 (9th Cir. 1997); United States v. Allen, supra.

In this case, proof of the requisite minimal effect on interstate commerce of the defendants' transactions was overwhelming and undisputed. Perhaps even more importantly, the court instructed the jury that the term "monetary transaction" "means the deposit, withdrawal, transfer or exchange, in or affecting interstate commerce." [Vol. XIX, p. 43]. Therefore, even assuming that it was error for counsel to fail to object to the indictment or to fail to request specific additional instructions on the interstate commerce nexus, the error could not have been prejudicial to Mohwish. For the same reasons, even assuming that the language in 18 U.S.C. § 1957 (d) which requires the offense to

take place in the United States or for the defendant to be a United States citizen constitutes an essential uncharged element of the offense, the failure to challenge the indictment or to object to the instructions on that ground [Ftn.10] was not prejudicial error.

> [Ftn.10: Although not noted by the Government in its response, the court also instructed the jury that the elements of a violation of 18 U.S.C. § 1957 required "that the monetary transaction occurred within the United States." [Vol. XIX, p. 43].]

In light of the conclusion that object #4 was not legally insufficient, and because the proof was overwhelming and any error was harmless as to object ##5 and 6, the "one-is-enough" conspiracy charge given to the jury on Count 13 was adequate.

6. CTRA Charge (Count 15)

a. Specific Intent

Count 15 of the indictment charged that the defendants acted "knowingly and willfully" to violate the CTRA. [Indictment at 32]. On direct appeal, the Sixth Circuit affirmed Mohwish's conviction on this count, rejecting the defendant's challenge to the sufficiency of the evidence. Patrick, 965 F.2d at 1395. Mohwish now complains that the jury instructions on Count 15 were insufficient to show that his conduct was "willful" under 31 U.S.C. § 5124.

The district court defined "willfully" in the course of its jury instructions under Count 2, for conspiracy. The court first

instructed the jury that it must find that the defendants "willfully participated" in that conspiracy.

> [T]o act or participate willfully means to act or participate voluntarily and intentionally and with some specific intent to do something the law forbids or with specific intent to fail to do something the law requires to be done; that is to say, to act or participate with a bad purpose either to disobey or disregard the law.

[Vol. XIX at 18].

The district court also defined "knowingly" in the general instructions as previously indicated and instructed the jury that they must find that the defendants acted with specific intent. (See *infra* subsection 3 at p. 22). With respect to Count 15, the jury was instructed specifically that:

> So the elements of the offense are: One, transaction involving currency in excess of $10,000 occurred in or with a financial institution; two, that defendants caused and aided and abetted the financial institution not to file a report regarding such transaction; three, that the defendant did so willfully and intentionally; four, that the failure to file was part of a pattern of illegal activity involving transactions exceeding $100,000 within a 12-month period.

[Vol. XIX at 40-41].

Finally, the court instructed the jury with respect to "aiding and abetting" that:

> In order to aid or abet another to commit a crime, it is necessary that the defendant willfully and knowingly associate himself in

> some way with the crime and that the willfully and knowingly seek by some act to help make the crime succeed.
>
> Participation in a crime is willful if the action is taken voluntarily and intentionally or, in the case of a failure to act, with the specific intent to fail to do something the law requires to be done; that is to say, with a bad purpose either to disobey or to disregard the law.

[Vol. XIX, p. 46].

Mohwish argues that to support his conviction, the jury was required to find that he knew he was breaking the law when he aided and abetted Gross in asking Maynard not to file a currency transaction report with regard to the $100,000 transaction. See, Ratzlaf v. United States, 114 S.Ct. 655 (1994). He argues that trial counsel committed constitutional error by failing to require a specific instruction regarding his knowledge of the illegality of failing to file a report.

Although Mohwish is correct in arguing that the jury was required to find that he knew that Maynard was obligated to file a currency transaction report, I conclude that the jury instructions in this case required to the jury to make the requisite findings. The instructions clearly required the jury to find that Mohwish acted "willfully and intentionally" when he "caused and aided and abetted the financial institution not to file a report." Thus, in order to convict Mohwish, the instructions appropriately required the jury to find that

Mohwish knew the financial institution was required to file a report, and that he acted to cause the institution to fail to file the report.

I therefore conclude that, unlike Ratzlaf, the instructions given were constitutionally adequate. Compare United States v. Bencs, 28 F.3d 555, 564 (6th Cir. 1994), cert. denied, 115 S.Ct. 915 (1995) (reversal required where jury erroneously instructed that the government need not prove that the defendant knew structuring was against the law) with United States v. Hudson, 52 F.3d 326 (6th Cir. 1995) (Table, text available on Westlaw) (conviction affirmed where overwhelming evidence established defendant's knowledge, and jury instructions were silent about whether the prosecution had to prove the defendant knew his conduct was illegal) United States v. Dashney, 117 F.3d 1197, 1201 (10th Cir. 1997) (denying § 2255 relief on similar grounds, where jury instructions as a whole required jury to find "specific intent to do something the law forbids"). To the extent that the instructions were in any way erroneous, any error was harmless in this case. See Johnson v. United States, 117 S.Ct. 12544, 1550 (1997) (holding that misinstructing the jury on an essential element of the offense is "an error which is subject to harmless error analysis.")

b. Use of the term "Financial Institution"

Mohwish also argues that trial counsel's performance was deficient because he failed to object to the use of the term

"a financial institution" in the place of the name of the principal, "Union Bank and Trust Company, Irving, Kentucky," which was used in the indictment. Mohwish argues that by using the term "a financial institution," the court impermissibly amended and broadened the indictment. I disagree. There was no financial institution other than the Union Bank and Trust Company, Irving, Kentucky, to which the court's instructions plausibly could have referred.

7. The Tax Counts (Counts 33-35)

The indictment charged Mohwish with filing false tax returns. The district court instructed:

> Counts 33, 34 and 35 charge Joseph Mohwish and Kathy Mohwish with filing a false tax return in violation of Title 26, United States Code, Section 7206 (1) for tax years 1983, 1984 and 1985 respectively. Title 26, United States Code, Section 7206 (1) provides any person who willfully makes and subscribes any return statement or other document which contain or is verified by a written declaration that is made under the penalties of perjury and which he does not believe to be true and correct or to every material matter shall be guilty of an offense.
>
> The essential elements that must be established by the United States beyond a reasonable doubt are: one, that the defendants made and subscribed a return statement or document that was incorrect or to a material

matter, i.e., their true adjusted gross income; two, that the return statement or document contained a written declaration that it was made under penalties or perjury; three, that the defendants did not believe the return statement or document to be true. . . .; four, that the respective defendant taxpayer falsely subscribed to the return willfully . . . .

[Vol. XIX at 47-48]. Mohwish argues that because he was charged only with filing false 1040 returns, the language of the jury instructions which referred to filing a "return statement or other document" impermissibly broadened the indictment. Mohwish contends that the jury might have convicted him for filing some other document rather than a false 1040 return, and that therefore his convictions must be reversed.

However, the instruction given simply tracked the language of 26 U.S.C. § 7206 (1), which makes it unlawful for any person to willfully file any "return, statement or document." The use of the terms did not broaden the indictment but merely stated the essential elements of the offense. The evidence clearly indicated that Mohwish was charged with filing a false tax return, and not some other document, and the jury was properly instructed that they were required to find that he "falsely subscribed to the return willfully." Therefore, it was not Strickland, error for trial counsel to fail to object to the instructions as given.

8. Failure to Investigate Allegations by William Carroll

At trial, the Government's first witness was William Carroll. Defendant Mohwish contends that Carroll was the only witness whose testimony linked him with cocaine in any way, and that counsel's failure to refute portions of Carroll's testimony constitutes the ineffective assistance of counsel. Mohwish argues that trial counsel should have interviewed and called prospective witnesses Jimmy Mikels and Edwardo Ruiz to refute Carroll's testimony that he had seen Mohwish with or near cocaine on two occasions. Mohwish further argues that counsel should have introduced objective physical evidence such as blueprints or a video of the master bedroom closet to refute Carroll's testimony that he had seen a hidden room containing money and pills in a shoe box. Finally, Mohwish argues that counsel should have more effectively undermined testimony by Carroll regarding an allegedly overheard conversation about 1099 tax forms.

One of the occasions about which Carroll testified that he saw Mohwish with or near cocaine was Memorial Day of 1985. Carroll testified that on that day, while he and Mohwish were being taken on a tour of the lower level of Bill Patrick's home, Carroll saw bags of powder that both Patrick and Mohwish identified as "nose candy."

According to Mohwish, Jim Mikels could have provided testimony refuting Carroll's testimony. [Ftn.11.]

Mikels, a former employee of Season Sash, could have testified that two months after Memorial Day 1985, he had attended a barbecue with Carroll at which time Carroll had inquired where Mr. Patrick lived and whether Patrick's home was as nice as the house of the host of the barbecue. Allegedly, Carroll seemed very surprised that Patrick lived next door and told Mikels that he thought Patrick lived in another part of Kentucky.

> [Ftn.11: In his traverse to the Government's response, Mohwish contends that he has "supported his claims [concerning the testimony of prospective witnesses] with affidavits." However, no affidavits were attached to the motion to vacate or to the memorandum filed in support thereof, nor do such affidavits appear anywhere else in the record.]

Trial counsel's failure to call Mikels to so testify was not error, but instead amounts to trial strategy. Contrary to Mohwish's argument in this proceeding, counsel did not fail to refute Carroll's testimony. In fact, defense counsel impeached Carroll by bringing into evidence a prior felony conviction, and by presenting evidence that Bill Patrick was not at home but instead was in Salyersville over Memorial Day weekend, 1985. [See closing, Vol. XVIII, pp. 29-30].

According to Mohwish, Mikels also could have refuted testimony by Carroll that Mohwish had openly discussed the potential cocaine market in Nashville, how to launder money by avoiding the currency transaction reporting requirements, and - during a conversation regarding a plane loaded with cocaine that had crashed - how cocaine was cut, what the street

value of it was, how much the lost plane load was worth, and that cocaine was cheaper overseas. Mohwish alleges that Mikels would have testified that he worked very closely with Mohwish from 1984-87, had frequently been to the Mohwish residence, had never heard Mohwish talk about drugs or laundering money or seen him carry large sums of cash or possess cocaine, and had never seen a hidden room of the Mohwish's bedroom closet. Mikels also could have testified that he believed Carroll to be sleazy and a liar.

Once again, counsel's failure to present Mikels to so testify was not error, but a matter of trial strategy. Numerous witnesses testified similarly that they had never seen Mohwish carry large sums of cash or possess drugs, and Carroll's character was likewise attacked through the prior conviction and other witnesses. [See closing, Vol. XVIII, p. 130-132].

A second specific incident involving cocaine about which Carroll testified occurred in the fall or early winter of 1985, when Carroll observed Mr. Ruiz hand Mohwish what appeared to be a small package of cocaine at a party at Mohwish's house, at which time Mohwish told Carroll that Ruiz was "the man." According to Mohwish, Ruiz could have testified that he did not know Carroll, had never met or seen him at a party, and that Ruiz had only been at Mohwish's house prior to Carroll's being hired at Season Sash. Ruiz also would testify that he had never given Mohwish any cocaine.

Once again, trial counsel's failure to call Ruiz was not constitutional error, but only amounts to a choice of trial strategy. Other witnesses testified that they had attended parties and had never seen the events described by Carroll. Other witnesses also identified a man referred to as "Eddy" as a source of cocaine; therefore, trial counsel's decision not to call Ruiz was likely a calculated one.

Mohwish additionally attacks counsel's failure to refute Carroll's testimony that he overheard a telephone conversation between Mohwish and Gross in November or December of 1985 in which Gross had been extremely upset about a 1099 tax form that Mohwish had sent to him. Carroll testified that Mohwish had quickly taken the call off the speaker phone and told Mr. Gross that he would be over later to discuss the matter.

Evidence introduced at trial included a letter dated February 5, 1987 in which Gross disputed the issuance of the filing of a 1099 tax form for the year ending in 1986 and a responsive letter dated February 10, 1987 from Mohwish's accountant acknowledging the error. Carroll testified that he left the employment of Season Sash in January 1986. Mohwish argues that, based upon the February 1987 correspondence, any conversation that might have occurred on the issue must have taken place in early 1987, and not in December of 1985 as Carroll had testified. He argues that his trial attorney's failure to cross-examine Carroll on this point was Strickland error.

No error is evident. Chester Muier, Bill Sexton and Mohwish all testified to explain the event, and the inconsistency of the dates testified to explain the event, and the inconsistency of the dates testified to by Carroll as pointed out in closing argument by defense counsel. [Vol. XVIII, p. 97].

Finally, Mohwish argues that counsel should have introduced objective physical evidence to refute Carroll's testimony that, in the summer of 1985, Carroll observed a hidden room off from the inside of one of the closet walls containing a desk and file cabinets. Carroll also testified that he had seen a bag of pills and a shoe box with a lot of money in the hidden closet.

On cross-examination, trial counsel elicited from Carroll that he had only been in Mohwish's bedroom once, and that he could not remember any other details about the bedroom. Counsel also subsequently presented numerous witnesses who testified that they had never seen any such hidden room. The list of witnesses included: Darren Greene and Joey Mohwish, who played hide-and-seek in the closets at the house; Jan Linville, a neighbor who looked in the closets; Rick Myer, who remodeled the house and replaced the closet doors; and Larry Starks, a potential buyer who inspected the house. Thus, counsel's failure to introduce demonstrative physical evidence to show the absence of a hidden room was merely a strategic trial decision and did not amount to prejudicial error.

"[I]n any ineffective case, a particular decision not to investigate must be directly assessed for reasonableness in all circumstances, applying a heavy measure of deference to counsel's judgment." Strickland, at 691. In this case, trial counsel's failure to call as witnesses Mr. Mikels and Mr. Ruiz cannot be said to amount to Strickland error. Counsel effectively employed other witnesses and evidence to refute Carroll's testimony. There is not evidence that counsel was unaware of the existence of Mikels and Ruiz as prospective witnesses; only that he made a strategic decision not to use them.

In addition, counsel's failure to introduce demonstrative physical evidence to refute Carroll's testimony of a hidden room cannot be said to be anything but a legitimate strategic choice at the time, given the introduction of the testimony of other witnesses to refute Carroll's testimony, and effective cross-examination. "[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable." Id. at 690.

9. Cumulative Errors of Trial Counsel

Mohwish argues that the cumulative errors of trial counsel, as argued above, rendered his trial fundamentally unfair. In light of the above analysis, the court concludes that no substantial errors were committed by trial counsel. Accordingly, Mohwish's claim of cumulative error must fail.

10. Ineffective Assistance of Appellate Counsel

Mohwish also contends that his appellate counsel was ineffective for failing to raise in Mohwish's petition for rehearing the claim that the Sixth Circuit's ruling that Mohwish supervised Patrick created a material and prejudicial variance from the indictment which required reversal of Mohwish's CCE conviction. Count 1 of the indictment charged that Mohwish and Patrick acted "in concert with at least five (5) other persons with respect to whom Bill J. Patrick and Joseph A. Mohwish occupied positions of organizers, supervisors and managers. . . "

Mohwish argues that, based upon the language of the indictment, it is clear that he and Patrick were charged as "co-equal principals." In concluding that sufficient evidence supported Mohwish's conviction under Count 1, however, the Sixth Circuit held that one of the five persons Mohwish supervised was Patrick. Mohwish argues that neither the indictment nor the case presented by the Government at trial or on appeal supported a theory that Mohwish supervised Patrick, and that the Sixth Circuit's holding therefore created a fatal variance in the indictment. Mohwish argues that appellate counsel was ineffective for failing to raise this issue in the petition for rehearing.

A defendant does not have a "constitutional right to

have his counsel press nonfrivolous points requested by his client if counsel decides as a matter of professional judgment not to press those points." Jones v. Barnes, 463 U.S. 745 (1983). Appellate counsel is afforded great discretion in deciding which claims to pursue on appeal. However, appellate counsel may be "constitutionally deficient in omitting a dead-bang winner even while zealously pressing other strong (but unsuccessful) claims." Page v. United States, 884 F.2d 300, 302 (7th Cir. 1989). The problem for Mohwish is that he has not shown that appellate counsel omitted any "dead-bang" winners, and in fact, appellate counsel was remarkably successful in overturning many of defendant's convictions.

Mohwish additionally argues that appellate counsel was ineffective for failing to raise the issue that the cumulative errors of trial counsel undermined his right to a fair and reliable trial. This issue is easily disposed of, since Mohwish himself readily concedes that issues concerning the alleged errors of trial counsel may not be raised on direct appeal. Therefore, it cannot have been error for appellate counsel to fail to raise the "cumulative trial error" issue.

11. Alleged Errors Regarding Count 2

Happily for Mohwish, his conspiracy conviction under Count 2 of the indictment was reversed on direct appeal. In this § 2255 proceeding, Mohwish argues that he is reserving his right to raise five separate ineffective assistance of counsel

claims concerning that conviction. As the conviction has been vacated, the court presently lacks jurisdiction to review those claims.

III. CONCLUSION

Accordingly, IT IS RECOMMENDED HEREIN THAT defendant's motion to vacate or modify his sentence pursuant to U.S.C. § 2255 [Doc. #514] be DENIED and this matter dismissed with prejudice and stricken from the docket. Mohwish's recent request for an evidentiary hearing [Doc. #538] should be DENIED as moot.

OBJECTIONS to this report and recommendation must be filed with the Clerk of the Court within ten (10) days of the date of service of the same or further appeal is waived. United States v. Walters, 638 F.2d 947 (6th Cir. 1981), Thomas v. Arn, 474 U.S. 140 (1985). Poorly drafted objections, general objections or objections that require a judge's interpretation should be afforded no effect and are insufficient to preserve the right of appeal. See Howard v. Secretary of Health and Human Services, 932 F.2d 505, 509 (6th Cir. 1991). A party may file a response to another party's objections within ten (10) days after being served with a copy thereof. Rule 72 (b), Fed.R.Civ.P.

This the 6th day of January , 1998.

/S/
J. Gregory Wehrman
U.S. Magistrate Judge

APPENDIX B

FILED:
March 18, 1998
Eastern District of Kentucky
Leslie G. Whitmer
Clerk, U.S. District Court

CRIMINAL ACTION No. 88-54-2
(CIVIL ACTION NO. 97-40)

UNITED STATES OF AMERICA, PLAINTIFF,

v. ORDER

JOSEPH A. MOHWISH, DEFENDANT.

The defendant, by counsel, having moved the Court for relief pursuant to 28 U.S.C. § 2255, and United States Magistrate Judge J. Gregory Wehrman having recommended that the relief sought be denied [Record No. 539], and having considered the matter de novo in light of the defendant's objections to Magistrate Judge Wehrman's Report and Recommendation, and being advised,

IT IS ORDERED herein as follows:

(1) That the defendant's objections to Magistrate Judge Wehrman's Report and Recommendation be, and the same hereby are, **OVERRULED**.

(2) That Magistrate Judge Wehrman's Report and Recommendation be, and the same hereby is, **ADOPTED**.

(3) That the defendant's motion for relief pursuant to § 2255 be, and the same hereby is **DENIED**.

(4) That the above-styled action be, and the same hereby is, **STRICKEN FROM THE DOCKET**. This is a final and appealable order.

This 18th day of March, 1998.

/S/

Joseph M. Hood, Judge

Date of Entry and Service:

APPENDIX C

FILED:
May 22, 1998
At Frankfort
Eastern District of Kentucky
Leslie G. Whitmer
Clerk, U.S. District Court

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
COVINGTON

CRIMINAL ACTION NO. 88-54-2

UNITED STATES OF AMERICA, PLAINTIFF,

v. ORDER

JOSEPH A. MOHWISH, DEFENDANT.

* * * * * *

The defendant/appellant has moved the court for a certificate of appealability. The Court cannot grant the defendant/appellant a certificate of appealability, as the defendant/a;; appellant has failed to set forth any viable grounds for relief. Thus, the Court cannot certify that his appeal is taken in good faith. See Magistrate Judge's Report and Recommendation [Record No. 539].

Accordingly, with the court being sufficiently advised,

IT IS ORDERED that the defendant/appellant's motion [Record No. 550] for a certificate of appealability be, and the same hereby is, **DENIED**; a certificate of appealability is not issued for the reasons stated in the Magistrate Judge's Report and Recommendation [Record No. 539].

This is the 22nd day of May, 1998.

/S/

JOSEPH M. HOOD, JUDGE

Date of Entry and Service:

APPENDIX D

FILED:
September 23, 1998
Leonard Green
Clerk

No. 98-5708

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JOSEPH A. MOHWISH,	)	
	)	
Petitioner-Appellant	)	
	)	O R D E R
v.	)	
	)	
UNITED STATES OF AMERICA,	)	
	)	
Respondent-Appellee.	)	

Before: MARTIN, Chief Judge.

Joseph A. Mohwish appeals a district court decision denying his motion to vacate sentence filed under 28 U.S.C. § 2255. Mohwish has requested a certificate of appealability from this court.

Upon review, the application for a certificate of appealability is denied.

ENTERED BY ORDER OF THE COURT

/s/
Leonard Green

APPENDIX E

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, DC 20543

WILLIAM K. SUTER
CLERK OF THE COURT

AREA CODE 202
479-3011

December 14, 1998

Mr. Clifford J. Barnard
1790 30th Street
Suite 305
Boulder, CO 80301

Re: Joseph A. Mohwish
v. United States
Application No. A-473

Dear Mr. Barnard:

The application for an extension of time within which to file a petition for a writ of certiorari in the above-entitled case has been presented to Justice Stevens, who on December 14, 1998, extended the time to and including February 20, 1999.

This letter has been sent to those designated on the attached notification list.

Sincerely,

WILLIAM K. SUTER, Clerk

By

/S/
Loretta S. Ruffin
Assistant Clerk

APPENDIX F

Fifth Amendment to the United States Constitution:

> **Grand Jury - indictment - jeopardy - process of law - taking property of public use.** No person shall . . . be deprived of life, liberty, or property, without due process of law . . .

APPENDIX G

Sixth Amendment to the United States Constitution:

> **Rights of accused.** In all criminal prosecutions the accused shall enjoy the right . . . to have the assistance of counsel for his defense.

APPENDIX H

21 U.S.C. § 848. Continuing criminal enterprise

. . .

Continuing criminal enterprise defined

(c) For purposes of subsection (a) of this section, a person is engaged in a continuing criminal enterprise if–

(1) he violates any provision of this subchapter or subchapter II of this chapter the punishment for which is a felony, and

(2) such violation is a part of a continuing series of violations of this subchapter or subchapter II of this chapter–

(A) which are undertaken by such person in concert with five or more other persons with respect to whom such person occupies a position of organizer, a supervisory position, or any other position of management, and

(B) from which such person obtains substantial income or resources.

. . .

APPENDIX I

28 U.S.C. § 2253. Appeal

(a) In a habeas corpus proceeding or a proceeding under section 2255 before a district judge, the final order shall be subject to review, on appeal, by the court of appeals for the circuit in which the proceeding is held.

. . .

(c) (1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from--

(A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; or

(B) the final order in a proceeding under section 2255.

(2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

(3) The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2).

APPENDIX J

28 U.S.C. § 2255. Federal custody; remedies on motion attacking sentence

A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgement vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

. . .

An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus.

. . .